

No. 11-5696

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUITIn re: ARTHUR L. ARMSTRONG,

Movant.)
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)O R D E R**FILED*****Jun 20, 2012***

LEONARD GREEN, Clerk

Before: GILMAN and ROGERS, Circuit Judges; ECONOMUS, District Judge.*

Arthur L. Armstrong, a pro se Tennessee prisoner, moves this court for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus relief filed under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b). The state has filed a response to which Armstrong has replied.

In 1978, a jury convicted Armstrong of armed robbery, rape, kidnapping for the purpose of armed robbery, and two counts of crimes against nature. The court sentenced him to two life sentences, a twenty-year term of imprisonment, and two indeterminate terms of not less than ten years nor more than fifteen years of imprisonment, all to be served consecutively. The Tennessee Court of Criminal Appeals affirmed Armstrong's convictions and sentences. *Armstrong v. State*, No. C-2854 (Tenn. Crim. App. Feb. 27, 1980).

Thereafter, Armstrong filed a petition for post-conviction relief, which the trial court denied. Both the Tennessee Criminal Court of Appeals and the Tennessee Supreme Court affirmed.

*The Honorable Peter C. Economus, United States Senior District Judge for the Northern District of Ohio, sitting by designation.

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In 1992, Armstrong filed his first § 2254 petition for a writ of habeas corpus. The district court denied the habeas petition for lack of exhaustion. Thereafter, Armstrong filed a petition for state habeas corpus relief, which the trial court denied. Although the Tennessee Court of Criminal Appeals affirmed, it determined that Armstrong's appellate claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing evidence that the victim admitted that she did not see her assailants should be presented in a state post-conviction proceeding. *Armstrong v. State*, No. 01C01-9311-CR-00403, 1994 WL 695424 (Tenn. Crim. App. Dec. 8, 1994).

In September 1995, Armstrong filed a second petition for state habeas relief. The trial court conducted an evidentiary hearing, concluded that the *Brady* claim lacked merit, and denied the petition. The Tennessee Court of Criminal Appeals affirmed. *Armstrong v. State*, No. 01C01-9608-CR-00331, 1997 WL 602939 (Tenn. Crim. App. Sept. 30, 1997).

In 1999, Armstrong filed a second habeas petition and an amended petition, arguing that the state court erred when it concluded that no *Brady* violation had occurred and that counsel rendered ineffective assistance. The district court dismissed Armstrong's habeas petition, concluding, inter alia, that the trial court properly concluded that the prosecution did not violate *Brady*. We affirmed. *Armstrong v. Morgan*, 372 F.3d 778 (6th Cir. 2004).

In June 2011, Armstrong filed a motion for an order authorizing the district court to consider a second or successive § 2254 habeas petition, again arguing that the prosecution withheld exculpatory evidence in violation of *Brady*. He maintains that the state failed to disclose reports containing the victim's statement that she was unable to identify her assailants.

A claim presented in a prior § 2254 petition must be dismissed. *See* 28 U.S.C. § 2244(b)(1). Armstrong presented his *Brady* claim in his prior § 2254 habeas petition and we affirmed the district court's rejection of the claim as being without merit. Although his present petition styles this claim as an actual-innocence claim, the substance of his current claim is essentially the same as the *Brady* claim that this court denied nearly eight years ago. Therefore, we dismiss the claim pursuant to § 2244(b)(1).

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Accordingly, we deny Armstrong's motion for an order authorizing a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "J. Michael Smith", is written above the title "Clerk".

Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard Green
Clerk

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Re: Case No. 11-5696, *In re: Arthur Armstrong*
Originating Case No. : 3:99-CV-265

Dear Counsel and Mr. Armstrong:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034

cc: Mr. Keith Throckmorton

Enclosure

No mandate to issue